IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Dwight Brashear,	)	
Plaintiff,	)	
	)	Case. No. 15 C 6665
v.	)	
	)	Judge Ronald A. Guzmán
SCR Medical Transportation, Inc.,	)	
Pamela Rakestraw, and	)	
Stanley Rakestraw,	)	
Defendants.	)	

ORDER

For the reasons stated below, Defendants' motion for summary judgment [51] is granted. All other pending motions are stricken as moot. Civil case terminated.

STATEMENT

Dwight Brashear sues his former employer, SCR Medical Transportation, Inc., and its owners, Pamela Rakestraw and Stanley Rakeshaw, for fraudulent misrepresentation, breach of contract, and violation of the Illinois Wage Payment Collection Act ("IWPCA"). Defendants move for summary judgment as to all counts.

Facts

Throughout 2013, Plaintiff was employed at Keolis Transit America, Inc. ("Keolis") in Las Vegas, and as of March 2013, his position was Executive Vice President of Business Development and General Manager of Keolis' fixed route contract. (Pl.'s Resp. Defs.' Stmt. Facts, Dkt. # 61, ¶ 2.) Plaintiff reported to the CEO, and his base salary in 2013 was $200,000 plus benefits. (*Id.* ¶¶ 2-3.) Plaintiff met and hired Tita Amhaz as his assistant at Keolis in or about April 2013. (*Id.* ¶ 4.) Plaintiff and his wife built a house in Las Vegas in or around July 2013, it was completed in October 2013, and he and his family moved in sometime in or around November 2013. (Id. ¶ 5.)

Defendant SCR is an Illinois corporation with its principal place of business in Chicago, Illinois. (*Id.* ¶ 6.) Defendants Stanley Rakestraw and Pamela Rakestraw have owned SCR since 1986 and are the sole Board members of SCR's Board of Directors. (*Id.* ¶¶ 7-8.) Stanley was the Chief Operating Officer and Pamela was the Chief Executive Officer during Plaintiff's tenure at SCR. (*Id.* ¶ 9.) Stanley and Pamela have two sons, Justin and London, who are both employed at SCR though neither has an ownership interest. (*Id.* ¶ 11.) During the relevant period, Justin worked as President of Business Development, Senior Driver Manager, and Vice-President of Operations. (*Id.* ¶ 12.)

In or around late July or early August 2013, Plaintiff received a call from a job recruiter named Daphne LeBlanc Whit Meyer while he was employed at Keolis. (*Id.* ¶ 14.) LeBlanc has recruited Plaintiff for at least two other positions at other companies in the past, including at Tectran in or around July 2010, which later became Keolis in or around November 2011. (*Id.* ¶ 15.) LeBlanc testified that her initial contact with Plaintiff regarding SCR was to explore a potential joint venture between SCR and Plaintiff's current employer at the time, Keolis. (*Id.* ¶ 16.) LeBlanc also testified that SCR never hired her to recruit for a CEO candidate for SCR. (*Id.* ¶ 17.)

On October 21, 2013, Plaintiff flew to Chicago from Las Vegas for his first meeting with Justin, Stanley, and Pamela. (*Id.* ¶ 19.) LeBlanc testified that she told Plaintiff that the meeting was not an initial search for a President, but Plaintiff denies LeBlanc said this and asserts that LeBlanc told him she was interviewing for the job of President/CEO. (*Id.* ¶ 20.) The meeting went well, and it appeared there was mutual interest between the parties regarding Brashear's possible employment at SCR. (*Id.* ¶ 21.) On or about November 15, 2013, Plaintiff flew to Chicago to meet with Defendants again as well as other members of SCR's management team. (*Id.* ¶ 23.) Plaintiff understood that if he was hired, SCR would also hire his assistant at Keolis, Tita Amhaz, who also flew to Chicago for the second meeting. (*Id.* ¶ 24.)

On December 12, 2013, SCR offered Plaintiff the position of President at SCR. (*Id.* ¶ 25.) The offer letter indicated that he would report to the Board of Directors, and stated that the purpose of the letter and attached agreement was to set forth an understanding of the terms of Plaintiff's employment with SCR, including his job description and compensation. (*Id.*) On December 24, 2013, Justin sent Plaintiff an email attaching "exhibit A to your contract which outlines your job description and bonus metrics" and stating that Plaintiff should "[f]eel free to reach out if you have any questions." (*Id.* ¶ 26.) Plaintiff acknowledged receipt of the email and indicated he would review the document, but does not recall providing any comment. (*Id.* ¶ 28.) Plaintiff also sent the letter to a lawyer for review. (*Id.* ¶ 29.)

On or about January 31, 2014, Plaintiff received an email titled "Final EA," which attached the final version of his employment agreement, including his job description attached as Exhibit A. (*Id.* ¶ 30.) Pursuant to the agreement, Plaintiff's employment period was to last for three years, until February 28, 2017, and he was to receive a $237,500.00 annual salary, a $12,500.00 signing bonus, a $2,500.00 per month housing stipend, and a company car. (Id. ¶ 33.) The agreement also provided that Plaintiff was eligible for a performance-based annual bonus. (*Id.* ¶ 34.)

Plaintiff moved to Chicago and began working at SCR on March 31, 2014, while his family remained in Las Vegas. (*Id.* ¶¶ 36-37.) In or around October or November of 2014, Plaintiff presented to the Board of Directors a "Third Quarter Review," which included as an agenda item Plaintiff's relocation back to Las Vegas while still being employed by SCR. (*Id.* ¶ 39.) On December 6, 2014, Plaintiff applied for another job at the Nevada Taxicab Authority ("NTA"). (*Id.* ¶ 42.) On January 26, 2015, the NTA notified Plaintiff that he was scheduled for an interview during their Board of Directors' meeting on February 12, 2015. (Id. ¶ 43.)

The following day, January 27, 2015, Plaintiff submitted his letter of resignation from SCR, which listed fourteen bullet points outlining what he stated were "good reasons" for his departure. (*Id.* ¶ 44.) His last day of employment at SCR was March 3, 2015, when he returned to Las Vegas after work. (*Id.* ¶ 45.) During his interview with the NTA, he told them he wanted to return to Las Vegas to be with his family. (*Id.* ¶ 46.)

Additional facts are set forth as necessary below. The Court notes that it has spent an exorbitant amount of time sifting through the record attempting to verify statements made by each party. It is apparent from the evidence, and in particular the deposition testimony of Plaintiff (which is unreadable at times given the interruptions and irrelevant comments by those present), that the relationship between Plaintiff and certain executives and employees at SCR was strained from the beginning and quickly soured. The Court has sought to the best of its ability to extract the relevant material information from the record in order to rule on the instant motion.

Motion for Summary Judgment Standard

Summary judgment must be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Not every dispute between the parties makes summary judgment inappropriate; "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* To determine whether a genuine dispute of material fact exists, the Court must construe all facts in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Ogden v. Atterholt*, 606 F.3d 355, 358 (7th Cir. 2010).

Analysis

A. Fraudulent Misrepresentation

Plaintiff alleges that during conversations prior to his hiring, Defendants made fraudulent misrepresentations about the company's goals to expand and the likelihood of bonuses related to that expansion, the status of SCR's relationships with certain clients, Plaintiff's responsibilities, and to whom he would report. (*Id.* ¶ 47.) "To state a cause of action for common-law fraud in Illinois, a plaintiff must plead: (1) a false statement of material fact; (2) knowledge or belief by the maker that the statement was false; (3) an intention to induce the plaintiff to act; (4) reasonable reliance upon the truth of the statement by the plaintiff; and (5) damage to the plaintiff resulting from this reliance." *Mukite v. Advocate Health & Hosps. Corp.*, No. 15 C 7604, 2016 WL 4036755, at *3 (N.D. Ill. July 28, 2016) (internal citation and quotation marks omitted).

Before addressing whether genuine issues of material fact exist as to the purported fraudulent misrepresentations, the Court must identify what the alleged misrepresentations were. Plaintiff argues that "SCR made at least 11 separate misrepresentations to him regarding what authority he would have if he joined SCR, their readiness for national expansion, and its relationships with its current clients." (*Id*. at 6.) Based on its reading of Plaintiff's response brief, the following are the alleged misrepresentations:

(1) Plaintiff would only report to the owners;
(2) Plaintiff "could have earned" the bonus, the terms of which are set forth in the Agreement;
(3) Plaintiff, as President, would be empowered with the duties, responsibilities, and autonomy associated with the title of President;
(4) Plaintiff would "run" SCR;
(5) SCR had a "great" relationship with its largest client PACE and its other clients;
(6) SCR had everything in place necessary for national expansion and was "ready" for it;
(7) SCR was not facing any challenges;
(8) SCR had the "stomach" to undertake national expansion;
(9) SCR was prepared to take on the additional service requirements of PACE's largest contract;
(10) SCR "outperformed" their PACE competitors.[1]

The Court notes that Plaintiff's discussion of the purported fraudulent misrepresentations is fleeting at best. While he discusses three of the purported misrepresentations, he leaves others completely untouched in his brief, simply listing them and stating conclusorily that "[i]n cases like this one, where the plaintiff presents evidence that the statements in question were false at the time defendant made them," the plaintiff may present his case to a jury. (Pl.'s Resp., Dkt. # 62, at 8.) But Plaintiff fails to discuss in his brief how or why the statements were false, and leaves it up to the Court to parse through his responses to Defendants' statements of fact and make his arguments for him. While such an approach may be technically permissible on summary judgment, it is hardly effective. *Sojka v. Bovis Lend Lease, Inc*., 686 F.3d 394, 398 (7th Cir. 2012) ("It would have been much better for [plaintiff] to call the court's attention more concretely to his additional theories in the accompanying legal memorandum, rather than relying just on his statement of facts. He could have included a separate argument section, for example, that spelled out why summary judgment was inappropriate because of the disputes of fact over [defendant's] ability to stop work in high winds and [plaintiff's] need to work with experienced supervision.").

Indeed, in setting forth the alleged misrepresentations, Plaintiff cites only to his own statement of additional facts ("PSOF"), which points out the alleged misrepresentations, but fails to identify record support establishing why the statement is purportedly false. (Pl.'s Resp., Dkt. # 62, at 8.) The Court has attempted to root through all of the filings and address Plaintiff's arguments to the best its ability given the lack of direction provided by Plaintiff. Needless to say, any contention by Plaintiff in a future motion to reconsider that the Court did not address certain arguments or facts will not be looked upon with favor.

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[1] This list contains only ten purported misrepresentations because Plaintiff listed the misrepresentation regarding SCR's readiness to pursue national expansion twice.

With respect to the first element of a fraud claim, Defendants contend that Plaintiff cannot establish that certain of their alleged statements were actionable because they were true,[2] constitute opinions, or related to future or contingent events.

As noted by the Seventh Circuit:

> In the Restatement (Second) of Torts treatment of fraud, for example, statements about a party's opinions, preferences, priorities, and bottom lines are generally not considered statements of fact material to the transaction. *See* Restatement (Second) of Torts § 538A cmts. b, g (distinguishing between representations of facts—where the maker has definite knowledge—and opinions—including a "maker's judgment as to quality, value, authenticity or similar matters as to which opinions may be expected to differ").

United States v. Weimert, 819 F.3d 351, 358 (7th Cir. 2016). "In determining whether a statement is one of fact or opinion, the court looks to the surrounding facts and circumstances." *Krieger v. Adler, Kaplan, & Begy*, No. 94 C 7809, 1997 WL 323827, at *4 (N.D. Ill. June 11, 1997), *on reconsideration in part*, No. 94 C 7809, 1997 WL 349988 (N.D. Ill. June 20, 1997). As noted by the Seventh Circuit, the Court must:

> focus on the circumstances surrounding the representation[s] to determine whether the plaintiff may have justifiably relied on the opinion as though it were a statement of fact. Among the relevant factors in such a case are the access of the parties to outside information and the relative sophistication of the parties.

Lascola v. U.S. Sprint Comm., 946 F.2d 559, 568 (7th Cir. 1991) (internal quotations omitted).

Comments by Defendants that SCR had "great" relationships with their clients, including PACE, their largest client, and that SCR outperformed its PACE competition are opinions and do not provide a basis for a claim of fraud. *See Krieger*, 1997 WL 323827, at *4 ("[E]ven if defendant did make statements that touted the quality and reputation of AKB [the defendant law firm], such statements were made in the process of recruiting [the plaintiff]. . . . [and] [a]s the Seventh Circuit noted . . . , such puffery is common between a prospective employer and employee and are merely statements of opinion that cannot qualify as fraudulent misrepresentations. . . . It is obvious that, during negotiations, a potential employer will stress only the positive aspects of its firm.") (citations, alterations, and internal quotation marks omitted). The descriptive term "great" as it was used here is inherently subjective and open to various interpretations. *See Corley v. Rosewood Care Ctr., Inc. of Peoria*, 388 F.3d 990, 1008–09 (7th Cir. 2004) (observing that highly subjective expressions "come[ ] under the category of sales puffery upon which no reasonable person could rely in making a decision"). The same is true for the term "outperformed," which could be referring to any number of areas as to which Defendants evaluate their performance.

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[2] Plaintiff acknowledges that Defendants' statements that SCR's goal was to expand nationally and that it needed a President with the skills necessary to put the expansion in place were true. (Pl.'s Resp., Dkt. # 62, at 6 n.5.)

Plaintiff's assertion that SCR had been assessed liquidated damages by PACE for failing to meet performance expectations in excess of $500,000.00 in March 2014 and several hundred thousand dollars in the months before demonstrates that the relationship with PACE was not "great" does not alter the Court's conclusion. Pamela Rakestraw may have perceived her relationship with PACE as being "great" despite its incurring ongoing liquidated damages.

Pamela's statement during the interview process that SCR had a new contract opportunity with PACE and could satisfy the contract requirements "without a lot of effort" as well as Defendants' representation that Plaintiff would easily earn bonuses and become a "very rich man" are properly viewed as opinions or puffery. *See Power v. Smith*, 786 N.E.2d 1113, 1119 (Ill. App. Ct. 2003) ("In particular, statements regarding the future profitability of an endeavor are not statements of material fact."). Likewise, statements that SCR was "not facing any challenges" and had the "stomach" for national expansion are properly characterized as opinions or statements as to the future that are not a matter of fact. *See* 48 Am. Jur. Proof of Facts 3d § 6 (cumulative supplement) (statements not actionable as fraud include "statements about the future profitability of a business, the future growth of an industry, how good a particular investment will prove to be, a prediction of the market value of stock, the potential for growth of a prospective employer, and the like.").[3]

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[3] At various points in his additional statement of facts and supporting affidavit, Plaintiff asserts that Defendants misrepresented that SCR was capable of and poised to expand nationally. (Pl.'s Stmt. Add'l Facts, Dkt. # 60, ¶ 15 ("[Plaintiff . . . uncovered information which made it clear that national expansion was prohibitive . . . ."); *id.* ¶ 15g. ("SCR was completely unprepared for national growth"); *id.* ¶ 15 ("Plaintiff advised Stan Rakestraw that SCR was not ready for expansion early on in his employment, and they agreed that a strategic plan was not feasible."); *id.* ¶ 19 ("In the course of SCR's preparation of the West Palm Beach RFP, Brashear learned that the company also lacked the personnel, talent, and technical expertise to put together a professional RFP that would allow them to compete nationally.").) However, in the resume he sent to the Nevada Taxicab Authority on December 6, 2014, in application for the position of Administrator of the Authority, he states that "SCR is poised for tremendous growth, and as SCR's President, [he] is looking to lead the company to new heights through a strategic balance of organic growth and targeted acquisitions." (Def.'s App., Ex. 3, Brashear Dep., Dkt. # 53-4, Ex. 21, at Page 123 of 194.) He further represents in the resume that he "hopes to expand this

To the extent that any of the above statements are not opinions, they are too vague and nonspecific to constitute statements of fact. *LaScola*, 946 F.2d at 568 (statements that "the company has a lucrative compensation plan; the executives are 'straight shooters' . . . [and that] US Sprint is ethical and committed to conducting business in accordance with the law . . . are too general and difficult to substantiate to be considered statements of fact.").

With respect to the alleged misrepresentation that Plaintiff would only report to Pamela and Stanley, Plaintiff has failed to show that this was a false statement of material fact. Not only does Plaintiff not explain how this statement was material, but his discussion on the issue is off point and limited to highlighting the amount of authority that London and Justin had. Plaintiff contends that "[t]here are numerous facts supporting that the Rakestraw sons had more authority than [Plaintiff], could make decisions that he could not, were regarded by employees as 'co-owners,' were not held to the same company policies and standards as other employees, and certainly did not report to [Plaintiff]." (Pl.'s Mem. Resp. Mot. Summ. J., Dkt. # 62, at 6.) But these points are irrelevant to the issue of to whom he was supposed to report. Nor does Plaintiff point to any record evidence establishing that when he was purportedly told that he would report only to Pamela and Stanley, it was an intentional misrepresentation. *Ass'n Benefit Servs., Inc. v. Caremark RX, Inc*., 493 F.3d 841, 853 (7th Cir. 2007) ("A claim for fraud, promissory or otherwise, requires a showing that, at the time the allegedly fraudulent statement was made, it was an intentional misrepresentation.") The Court finds that Defendants' statement that Plaintiff would only report to Pamela and Stanley cannot support a claim for fraudulent misrepresentation.

Plaintiff further claims that SCR's assertion that it was looking to hire someone who could "run the company" and would be empowered with the duties, responsibilities, and autonomy associated with the title of President were false. As an initial matter, Plaintiff cannot claim that the position was misrepresented to him given that Exhibit A to the Employment Agreement, which elaborates on the job description for President, contains at the end the following provision in bold capital letters:

> THE DUTIES AND RESPONSIBILITIES OUTLINED ABOVE ARE GENERAL GUIDELINES FOR THIS POSITION AND SHOULD NOT BE INTERPRETED BY ANY EMPLOYEE AS THE ONLY DUTIES FOR THIS POSITION. MANAGEMENT RESERVES THE RIGHT TO ASSIGN ADDITIONAL DUTIES AND RESPONSIBILITIES RELEVANT TO THE POSITION AS IT DEEMS NECESSARY.

(Employment Agreement, Dkt. # 53-4, at Page 190 of 194.) "Absent circumstances indicating a manifest inequality between the respective parties, one who is aware of the nature and character of the instrument one is signing cannot subsequently avoid the terms of the instrument by

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Chicago-based company into a highly regarded national transportation provider" (*id*.), apparently notwithstanding his knowledge of certain facts underpinning his serious concerns whether expansion was possible for SCR.

claiming that he or she was deceived by representations outside the instrument itself." *Am. Sav. Ass'n v. Conrath*, 462 N.E.2d 849, 854 (Ill. App. Ct. 1984).

Moreover, these are statements regarding SCR's intentions for the position of President and are therefore not actionable as fraud. *Lefebvre Intergraphics, Inc. v. Sanden Mach. Ltd.*, 946 F. Supp. 1358, 1364 (N.D. Ill. 1996) ("A statement that 'merely expresses an opinion or that relates to future or contingent events, rather than past or present facts, does not constitute an actionable representation.'") (citation omitted); *Zaborowski v. Hoffman Rosner Corp*., 356 N.E.2d 653, 655 (Ill. App. Ct. 1979) (To be actionable, the misrepresentation "must be an affirmance of fact and not a mere promise or expression of opinion or intention; or in other words 'the fraud must be in the original contract or transaction, and not in its nonfulfillment.'") (quoting *Luttrell v. Wyatt*, 305 Ill. 274, 137 N.E. 95, 97 (1922)).

"[F]raud based upon a false representation of intent concerning future conduct," referred to as promissory fraud, is not actionable in Illinois unless it is part of a scheme to defraud. *Revolution Madison, LLC v. Eccles,* 2015 WL 3618739, 2015 IL App (2d) 140876-U, ¶ 59 (Ill. App. Ct. 2015). "[C]ases finding a fraudulent scheme indicate that a plaintiff has to show that a fraudulent intent existed at or before the time that the promise was made." *Id*. at ¶ 16; *see also Loggerhead Tools, LLC v. Sears Holdings Corp.,* No. 12-CV-9033, 2016 WL 5111573, at *5 (N.D. Ill. Sept. 20, 2016) ("For the scheme exception to apply, the plaintiff must show that the defendant did not intend to fulfill a promise *at the time the promise was made*.") (emphasis in original). Further, the burden to prove a scheme is high, and in order to prove that the defendants made a promise never intending to keep it, a plaintiff must point to "specific, objective manifestations of fraudulent intent." *Bower v. Jones*, 978 F.2d 1004, 1012 (7th Cir. 1992) (internal quotation marks and citation omitted).

Plaintiff wholly fails to point to *any* evidence establishing that Defendants' above-described comments were intentional misrepresentations of fact at the time they were made. *See id.* ("It's quite possible that defendants might very well have changed their mind about [the plaintiff] during his stay at the company, and while he may attempt to demonstrate that this was a breach of contract . . . , more is needed to state a claim for fraud."). *See also Ass'n Benefit Servs.*, 493 F.3d at 853 ("Illinois law does not allow the plaintiffs to proceed on a fraud claim when the evidence of intent to defraud consists of nothing more than unfulfilled promises and allegations made in hindsight."); *Zic v. Italian Gov't Travel Office*, 130 F. Supp. 2d 991, 995 (N.D. Ill. 2001) ("Objective proof of fraudulent intent is required because the mere failure to keep a promise could be caused by any number of motivations besides fraud."). While Plaintiff argues that intent is one for the jury to decide, Plaintiff bears the burden of referencing facts in the record from which reasonable jury could conclude that an intent to defraud existed. He has not done so here.

Further, Plaintiff's fraud claim fails for lack of reliance as to certain of the purported misrepresentations. For example, in discussing his second meeting with SCR personnel on November 14, 2013, including all four of the Rakestraws as well as department heads Dave Daley, Frank Ciccarella, and Vicki Hudson, Plaintiff stated that "I wasn't asking those questions [about challenges the company was facing] to determine whether or not I wanted to work for SCR." (Defs.' App., Ex. 2, Brashear Dep., at 84-85, 92, 95-96.) Moreover, Plaintiff could not have reasonably relied on representations that the company was not "facing any challenges." As a sophisticated businessperson, Plaintiff knew or should have known that even the most well-run companies with the most competent executives and personnel face "challenges." This is particularly true given that Plaintiff's own affidavit indicates he was aware that Pamela and Stan had different ideas for the company, which was facing challenges at the top level:

> At the November [2013] interview in Chicago, Pam Rakestraw confided that Stan could be a chauvinist and that he didn't believe women were capable of leading in the same way that men can, which bothered her. She further confided that she and Stan were concerned by their sons' lack of maturity.
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> Mrs. Rakestraw also confided that she and Stan were at odds relative to their goals for SCR. Stan wanted SCR to become the largest African-American owned company. Mrs. Rakestraw, on the other hand, was tired of all of the problems that go with owning a company and wanted to sell it.
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> During Justin and London Rakestraw's visit to Las Vegas in February 2014, before I signed my Employment Agreement, they confided to me that they desperately wanted to get their parents out of the business. They stated that the business would be best served if their parents spent most of their time in Ft. Lauderdale, Florida.
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> Justin and London Rakestraw confided in me that their parents fought a lot and that it was becoming a real problem. They said it was their hope that my presence would have a calming effect on them.
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> Stan Rakestraw confided to me at dinner the evening of our November [2013] interview that, at times, Pam would develop a 'bad attitude like most women do,' and it was better for all of us that she didn't attend that dinner.
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> . . .
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> In October and November 2013, and again in February 2014, Justin Rakestraw confided in me that he wanted his parents to completely step back from the Company and live in Florida, and it was his plan that if I took the job, he envisioned that I would eventually work from Las Vegas.

(Pl.'s Stmt. Add'l Facts, Brashear Aff., Ex. 1, Dkt. # 60-1, at 3-4.) Thus, to the extent Plaintiff can establish that the statements regarding challenges the company was facing and to whom he would be reporting were fraudulent or made with an intent to defraud, he cannot show reasonable reliance.

B. Fraudulent Concealment

A claim of fraudulent concealment requires that Plaintiff establish a duty to disclose the facts purportedly withheld from him. *Lillien v. Peak6 Investments*, L.P., 417 F.3d 667, 671–72 (7th Cir. 2005) ("Fraudulent concealment occurs when a person with a duty to speak conceals facts from another."). "A plaintiff must prove that one party to a negotiation has a duty, arising out of a confidential or fiduciary relationship, to reveal hidden facts to the other party." *Id*. "A fiduciary relationship may be found in one of two ways: It may be presumed from the relationship of the parties, such as in an attorney-client relationship; or, it may arise from the facts of particular situation, for example, where there is trust reposed on one side and resulting superiority and influence on the other." *In re Estate of Rothenberg*, 530 N.E.2d 1148, 1150 (Ill. App. Ct. 1988). "Where the alleged fiduciary relationship does not exist as a matter of law, the facts from which such a relationship arises must be proved by clear and convincing evidence." *Id*.

"The mere fact that the parties have engaged in business transactions or have a contractual relationship is not itself sufficient to establish a fiduciary relationship." *Benson v. Stafford*, 941 N.E.2d 386, 397-98 (Ill. App. Ct. 2010). "To determine whether a fiduciary relationship exists, courts look at factors including the degree of kinship between the parties, the disparity in age, health, education, or business experience between the parties, and the extent to which the servient party entrusted the handling of its business to the dominant party and placed its trust and confidence in it." *Id*. "'Generally, where parties capable of handling their business affairs deal with each other at arm's length, and there is no evidence that the alleged fiduciary agreed to exercise its judgment on behalf of the alleged servient party, no fiduciary relationship will be deemed to exist.'" *Id*. (citations omitted). "The 'essence' of a fiduciary relationship is dominance of one party by the other." *Id*.

Plaintiff has failed to point to record evidence creating a genuine issue of material fact as to the existence of a fiduciary relationship between the parties. While Plaintiff contends that the parties developed a close "relationship of friendship, trust and confidence" during the recruiting process, Illinois courts have held that "'in the absence of dominance and influence there is no fiduciary relationship regardless of the level of trust between the parties.'" *Benson*, 941 N.E.2d at 398 (citation omitted). The record does not reflect any dominance by Defendants over Plaintiff. Indeed, to the contrary, Plaintiff testified at his deposition that there were "three separate incidents that occurred that – where I made th[e] statement that I was done moving forward with the process" due to missteps by Defendants. (Brashear Dep., Dkt. # 53-3, at 175 ll.22-24.)

Specifically, Plaintiff stated that he had told the recruiters he had lost interest in continuing with the negotiation process with Defendants when: (1) prior to Plaintiff leaving Keolis, an SCR employee contacted Plaintiff's immediate supervisor at Keolis and asked "what it would be like to work for [Plaintiff]," and SCR subsequently terminated that employee; (2) Plaintiff was not happy with the proposed terms of the employment contract, including the length and "dollar considerations," and Pamela "very kindly" apologized, explaining to Plaintiff that

Defendants "had never hired anybody at this level before," and "if we stumble occasionally please forgive us . . . [as] we[] work[] through this kind of thing," and; (3) Justin inadvertently sent Plaintiff at his Keolis work email address a message attaching the SCR Employment Agreement, for which Justin later apologized to Plaintiff. (*Id*. at 176-189.) Plaintiff admitted that he could have terminated the negotiations at any time. (*Id*. at 188.)

Plaintiff, who has a Bachelor of Science degree in Business and over 25 years' experience in the transportation industry, including almost twenty years in executive roles in both the public and private sectors, clearly felt comfortable negotiating the terms of his contract with Defendants. He made his concerns known when he believed Defendants or their employees were conducting themselves inappropriately, and had no hesitation indicating he would walk away from any offer by SCR that was not in accordance with his expectations. Because no factfinder could reasonably conclude from this record that Plaintiff had a fiduciary or confidential relationship with Defendants, the Court grants summary judgment to Defendants on this claim.

C. Breach of Contract

"To prevail on a breach of contract claim, a plaintiff must establish the existence of a valid and enforceable contract, plaintiff's performance, defendant's breach of the terms of the contract, and damages resulting from the breach." *Spitz v. Proven Winners N. Am.*, LLC, 759 F.3d 724, 730 (7th Cir. 2014). According to Plaintiff, Defendants breached ¶ 5(a)(i) of the Employment Agreement by failing to make termination payments when he resigned purportedly for "good reason." Under the Agreement, good reason is defined to include, for purposes relevant here as identified by Plaintiff, "the assignment to the Executive of duties that are materially inconsistent with the position, authority, duties or responsibilities as contemplated by this Agreement or an adverse change in the Executive's reporting relationships as set forth in this Agreement." (Employment Agreement, Dkt. # 53-4, ¶ 3(f)(i).)

As an initial matter, the Employment Agreement provides that:

> the Executive shall not be deemed to have terminated his employment with Good Reason hereunder unless and until there shall have been delivered to the Company a Notice of Termination that: (1) states that Executive is terminating his employment with Good Reason; (2) *indicates the subsection of this definition that Executive is relying on*; and (3) provides some reasonable detail of the facts providing the basis for that reliance.

(*Id*., § 3(f)) (emphasis added). Plaintiff's notice of termination fails to expressly indicate the subsection of the definition for good reason that he is relying on. Nevertheless, Defendants do not raise an issue regarding a potential failure to perform or satisfy a condition precedent in their motion for summary judgment, so the Court does not address it.

At his deposition, Plaintiff was asked several times over two days what tasks he was assigned that he believed were inconsistent with his position as President. In response to the question, "[w]hat duties did they assign to you that you thought were inconsistent with your position as president," Plaintiff noted that during a meeting in December 2014, Pamela told him that "being a high-level administrator, . . . I need to roll up my sleeves and get involved in the day-to-day performance so that we could stop paying Pace $500,000 a month in liquidated damages." (Brashear Dep., Dkt. # 53-3, at 252.) Plaintiff was asked three more times if there was anything else, Plaintiff replied that he had no recollection "at this point." (*Id.* at 253.) During his continued deposition on the following day, he again was asked if there "[w]ere any other duties that you were assigned [inconsistent with your job]." (*Id.* at 378.) He responded, "None that jump out, you know, come to mind – right now." (*Id.*) In the affidavit submitted in support of his response to the summary judgment motion, however, Plaintiff presents a lengthy list of the various ways in which he was assigned tasks inconsistent with his level of authority, including: proofreading emails, inspecting vehicles, taking an active role in the hiring of drivers, assisting in the selection of dispatchers and call takers, handling customer and employee complaints, dealing with vendors on a data collection failure, investigating attendance issues with drivers, dispatchers, and call-takers, referee ongoing disputes between the maintenance manager and foreman, and deal with ongoing PACE delivery issues. (Pl.'s Stmt. Add'l Facts, Ex. 1, Dkt. # 60-1, Brashear Aff., ¶ 17.)

Defendants contend that the Court should strike Plaintiff's affidavit as contradicting his deposition testimony. *See Martin v. Indiana*, No. 1:12-CV-69-SLC, 2015 WL 4899008, at *3 (N.D. Ind. Aug. 17, 2015) ("[M]ost courts will disregard affidavits which blatantly contradict prior sworn testimony.") While the additional detail offered in the affidavit is unexpected given Plaintiff's deposition responses, the Court will not exclude the affidavit testimony. "It is common for lay witnesses to have at least occasional lapses of memory or needs for correction or clarification," and "an affidavit can be excluded as a sham only where the witness has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact." *Id.* (internal quotation marks and citations omitted). The Court does not find such circumstances here. Even considering his affidavit, however, Plaintiff fails to stave off summary judgment.

The Employment Agreement states that Plaintiff "shall have such duties and responsibilities as are consistent with the Executive's position *and* as may be reasonably assigned from time to time." (Employment Agreement, Dkt. # 53-4, ¶ 1) (emphasis added). Thus, the express language of the agreement states that Plaintiff's duties include those "as may be reasonably assigned from time to time." (*Id.*) Plaintiff does not address this aspect of the agreement or explain how the aforementioned tasks assigned to him do not comply with this language. Therefore, Plaintiff's breach of contract claim fails.

Plaintiff further ignores the qualifying language in the Agreement, which defines "good reason" as Plaintiff being assigned responsibilities and duties materially inconsistent with his role as President "*as contemplated by th[e] Agreement*." (Employment Agreement, Dkt. # 53-4, ¶ 3(f)(i)) (emphasis added). Exhibit A to the Employment Agreement, which is entitled

"President, SCR Medical Transportation, Inc., Position Description,"[4] indicates that "the President oversees company operations to ensure production efficiency, quality, service, and cost-effective management of resources" – an extremely general statement that encompasses a variety of tasks, including proofreading and hiring drivers, as well as managing SCR's relationship with PACE. (*Id*., Ex. A.) It further identifies as one of the "Position Duties and Responsibilities," that he "[m]anage[] all aspects of employee relations." Thus, Plaintiff's contention that as President he should not have had to interview employees, investigate attendance issues, and resolve employee disputes is unavailing given that these tasks are expressly covered in his job description.

Further, as already noted, Exhibit A to the Employment Agreement, which elaborates on the job description for President, contains at the end the following provision in bold capital letters:

> THE DUTIES AND RESPONSIBILITIES OUTLINED ABOVE ARE GENERAL GUIDELINES FOR THIS POSITION AND SHOULD NOT BE INTERPRETED BY ANY EMPLOYEE AS THE ONLY DUTIES FOR THIS POSITION. MANAGEMENT RESERVES THE RIGHT TO ASSIGN ADDITIONAL DUTIES AND RESPONSIBILITIES RELEVANT TO THE POSITION AS IT DEEMS NECESSARY

(Employment Agreement, Dkt. # 53-4, at Page 190 of 194.) Oddly, Defendants do not reference this disclaimer in their briefs. Nevertheless, Plaintiff does not contend that the disclaimer is invalid or unenforceable. Thus, the job description itself states that it sets forth only "general guidelines" and anticipates that the President will be expected to perform duties outside of those listed in the job description.[5]

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[4] Neither party disputes that Exhibit A was included in the January 31, 2014 email sent by Justin to Plaintiff with the "final copy" of the Employment Agreement, and that it, in addition to the Employment Agreement, governs the contractual relationship between the parties. (Pl.'s Stmt Add'l Stmt. Facts, Dkt. # 60, ¶¶ 14, 39-40.)

[5] To the extent Plaintiff believes, for example, that proofreading and hiring drivers were outside his responsibilities as President, he fails to present the Court with sufficient information from which it can conclude that a material issue of fact exists. Plaintiff attests that he had to proofread emails sent out to the client by one of the employees, but fails to indicate how often he had to do this or how much of his time was spent on it. Was it once a week or numerous times a day? Were they emails of one or two sentences or were they several pages in length? With respect to hiring drivers, how many drivers did he have to hire and exactly what did the task entail? The same can be said for all of the tasks he outlined in his affidavit at paragraph 17, as detailed above. Moreover, while Plaintiff contends each of the enumerated tasks was someone else's job, not only does he fail to point to any evidence in support of that assertion, but he also does not address why he, as President, was not requiring these individuals to do their jobs. The lack of any evidence or argument on these matters prevents this Court from properly addressing

Further, Plaintiff's citation to *Dabertin v. HCR Manor Care, Inc.*, 373 F.3d 822 (7th Cir. 2004), is inapposite. In that case, a Vice President of Operations for the defendant, which owned skilled nursing facilities across the country, gave notice that she was leaving the company after a merger and her perceived subsequent diminution in duties. *Id.* at 825. After being denied benefits under the employer's severance plan, the plaintiff sued her employer and the plan, arguing that she was entitled to benefits because she left the company for "good reason," defined in the plan as a "significant reduction in the scope of a Participant's authority, position, title, functions, duties or responsibilities." *Id.* at 826. The plaintiff's job changes included:

> (1) reduction of her independent capital spending authority from $6 million to zero; (2) elimination of her overhead budget development and implementation responsibilities and authority for advertising, public relations, consulting, business meetings, seminars and conventions; (3) elimination of her management functions including hiring and firing authority for seventy-three staff members; (4) elimination of independent authority to manage her total budget; (5) elimination of management functions and responsibilities in three areas; (6) discontinuation of construction project authority, functions and responsibilities in twenty sites in the Western Division; (7) elimination of a host of decision-making authority and other responsibilities for building projects and new markets; (8) elimination of operational, administrative and strategic authority, position, title, functions, duties or responsibilities for the Central Division; (9) reduction of her overall budget authority, her budgeted revenue, and her budgeted operating profit; (10) reduction by half of the number of skilled nursing units and the number of beds under her authority; and (11) a halving of the number of direct reports.

Id. at 828. The Seventh Circuit found that the plan administrator had acted arbitrarily and capriciously in denying benefits to the plaintiff. Specifically, the *Dabertin* court agreed with the district court that the plan's conclusion that the "scope" of the plaintiff's employment had not changed, "she just had fewer facilities in which to perform them," defied common sense. *Id.* at 829.

Here, Plaintiff's contractual right to resign voluntarily for good reason was not based on a change in the "scope" of his duties, but on being assigned duties "materially inconsistent" with the position, authority, and duties of the President. The Court finds no basis to equate the two, particularly where the facts between the two cases differ considerably. In *Dabertin*, the plaintiff had been an Executive Vice-President for "some portion" of seventeen years at a large company with numerous divisions across the country, and had become "accustomed to her duties as vice-president." *Id.* at 824. After a merger, she experienced a substantial loss in her territory, budget, number of direct reports, and management authority for employees. Plaintiff, on the other hand, had just joined SCR, a much smaller, family-owned and operated company with no national presence, and there is no indication that he had become accustomed to certain duties. Plaintiff's

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the substance of Plaintiff's position in this regard.

citation to *Dabertin* is therefore inapposite.

With respect to the "adverse change" in his reporting relationships, Plaintiff appears to contend that he actually had to report to London and Justin Rakestraw and not Pamela and Stan Rakestraw. His entire discussion of the issue is as follows:

> "Good reason" is also defined as an "adverse change" in Brashear's reporting relationships. SOF Resp. ¶ 74. The facts surrounding the sons' authority and to whom Brashear actually reported ha[ve] already been addressed.

(Pl.'s Resp., Dkt. # 62, at 13.) This is not an argument but an invitation to the Court to search through Plaintiff's filings in an attempt to ascertain what he is referring to. As discussed previously, Plaintiff's entire discussion of this issue is located in the fraudulent misrepresentation section of his response brief and relates solely to whether the sons had to report to him, not his reporting relationship to the Board. (*Id.* at 6 ("The first [alleged misrepresentation] Defendants challenge is that Brashear would only report to the owners. . . . There are numerous facts supporting that the Rakestraw sons had more authority than Brashear, could make decisions he could not, were regarded by employees as 'co-owners,' were not held to the same company policies and standards as other employees, and certainly did not report to Brashear.").)

To the extent Plaintiff asserts that there was also an "adverse change" in the reporting relationship because Justin and London were supposed to report to him but did not and essentially did as they pleased, the argument fails. As noted already, "good cause" is defined in the Agreement as "an adverse change in the Executive's reporting relationships *as set forth in this Agreement*." (Employment Agreement, Dkt. # 53-4, at 4 ¶ 3(f)) (emphasis added). Plaintiff fails to point to any provision in the Employment Agreement that requires Justin and London to report to him.

Therefore, to the extent that Plaintiff claims that Defendants breached the Employment Agreement for failing to make termination payments under § 5(a) of the Employment Agreement (*i.e.*, when Plaintiff terminates the Agreement with "good reason"), Defendants' motion for summary judgment is granted.

IWPCA

Plaintiff claims that he has not "been paid all compensation owed to him pursuant to his Employment Agreement," and that "[s]pecifically, Defendants failed and refused to pay Plaintiff the termination payments set forth in Paragraph 5(a)(i) of the Agreement." (1st Am. Comp., Dkt. # 26, ¶ 58.) Section 5(a)(i) of the Agreement provides for certain payments if the Company terminates Plaintiff's employment without cause or Plaintiff terminates for good reason. Plaintiff does not argue that Defendants terminated his employment without cause and the Court has rejected Plaintiff's arguments that he terminated the Agreement for good reason, as that term is defined in the Agreement. Therefore, Plaintiff's IWPCA claim fails.[6]

Conclusion

For the reasons stated above, Defendants' motion for summary judgment is granted as to the fraud and breach of contract claims. Civil case terminated.

Date: December 20, 2016

Ronald A. Guzmán
United States District Judge

[6] In his response brief, Plaintiff asserts that Defendants' failure "to pay him through the contractual notice period" violates both the Employment Agreement and the IWPCA. Plaintiff, however, fails to support this statement with any citations to the record or authority, so the Court does not address it.